STATE OF MICHIGAN

COURT OF APPEALS

JANICE NOWICKI, Personal Representative of the Estate of SCOTT NOWICKI, Deceased,

Plaintiff-Appellant,

v

JODY JOHNSTON,

Defendant-Appellee.

UNPUBLISHED
May 26, 2005

No. 252811
Alpena Circuit Court
LC No. 01-003115-NI

Before: Murray, P.J., and O'Connell and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals by right a finding of no cause of action entered following a jury trial. This case involves the accidental death of plaintiff's decedent from carbon monoxide poisoning. We affirm.

Defendant testified at trial that the decedent's vehicle became stuck in the mud during the night of June 13, 1998, as they were driving around in the woods. When they failed to free the vehicle, defendant and the decedent decided to stay the night in the car. Defendant testified that he went to call for help at around 2:00 p.m. the following day. After speaking with the decedent's mother and brother, defendant waited for the decedent's brother to help pull the vehicle out. While defendant was waiting, a group of other people found him and took him back to the area where the vehicle was stuck. When they arrived, they discovered that the vehicle was on fire, with the decedent still inside. Although it was initially thought the decedent died from the fire, it was later learned that he died from carbon monoxide poisoning before the fire started.

Plaintiff first argues that the trial court erred when it refused to give a jury instruction regarding the destruction of evidence. Specifically, plaintiff requested the jury be instructed that if it found that defendant had started the fire, it could presume that defendant was negligent in causing the decedent's death. We disagree that the court erred in failing to so instruct the jury. This Court reviews claims of instructional error de novo. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002). A trial court should give a jury instruction requested by a party if the instruction is applicable to the case and an accurate statement of the law. *Lewis v LeGrow*, 258 Mich App 175, 211; 670 NW2d 675 (2003). We review de novo the trial court's decision on whether a requested instruction is supported by the evidence and applicable to the case. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 515; 556 NW2d 528 (1996). We will not reverse instructional error unless the failure to do so would be inconsistent with

substantial justice. *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 339; 657 NW2d 759 (2002).

There is a general rule that if a party intentionally destroys evidence that was relevant to a case, a presumption arises that the evidence would have been adverse to that party's case. *Ward v Consolidated Rail Corp*, 472 Mich 77, 84; 693 NW2d 366 (2005); *Trupiano v Cully*, 349 Mich 568, 570; 84 NW2d 747 (1957). However, this presumption only applies "'where there was intentional conduct indicating fraud and a desire to destroy and thereby suppress the truth.'" *Trupiano, supra* at 570, quoting 20 Am Jur, Evidence, § 185, p 191. In *Johnson v Secretary of State*, 406 Mich 420, 433; 280 NW2d 9 (1979), our Supreme Court held that where there is a deliberate destruction of or failure to produce evidence within a party's control, there is a presumption that the evidence would operate against the party.

The trial court declined to give the requested instruction because it concluded that the evidence did not support it, and because it was unclear what additional evidence plaintiff would have presented had the fire not occurred. We agree with the reasoning of the trial court. Plaintiff failed to present any evidence that defendant intentionally or deliberately started the fire. Indeed, there was no evidence that defendant was anywhere near the vehicle when the fire started. Additionally, the trial court did instruct the jury that plaintiff's theory of the case was that defendant negligently caused the death and started the fire to cover up his negligence. Reviewing the jury instructions as a whole, we conclude that the trial court fairly and adequately presented the applicable law and each parties' theory of the case. See *Chastain v General Motors Corp* (*On Remand*), 254 Mich App 576, 591; 657 NW2d 804 (2002).

Plaintiff next argues that the trial court abused its discretion when it did not allow plaintiff to present an expert as a rebuttal witness or admit repair manuals as rebuttal evidence. We disagree. "Admission of rebuttal testimony rests within the sound discretion of the trial judge and will not be disturbed unless a clear abuse is shown." *Nolte v Port Huron Area School Dist Bd of Ed*, 152 Mich App 637, 644; 394 NW2d 54 (1986). "Rebuttal testimony is used to contradict, explain, or refute evidence presented by the other party in order to weaken it or impeach it." *Winiemko v Valenti*, 203 Mich App 411, 418; 513 NW2d 181 (1994). If evidence is responsive to evidence presented by the defendant, it is rebuttal even if it overlaps with evidence admitted during the plaintiff's case in chief. *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). However, "a party may not introduce evidence competent as part of his case in chief during rebuttal unless permitted to do so by the court." *Winiemko, supra* at 419.

Plaintiff's proffered rebuttal testimony and supporting exhibits were to be provided from a witness who was a mechanic at a local Ford dealership. The witness would have testified that the repair manuals for the decedent's vehicle did not show that it had a safety switch that would have required the clutch to be depressed to start the vehicle. Defendant had presented testimony of the former owner of the decedent's vehicle who stated that the clutch had to be depressed to start the car. While the court allowed plaintiff to present testimony from another witness that the safety switch could have been bypassed, it did not allow the expert to testify or the repair manuals to be admitted.

We conclude the court did not abuse its discretion in refusing to allow this rebuttal evidence. Plaintiff's expert did not have any knowledge about the decedent's specific vehicle. He had never driven it or inspected it. Additionally, whether the vehicle could have been started

without the clutch depressed was a collateral matter. Plaintiff had presented testimony that defendant had told a friend that he had started the vehicle throughout the night to keep warm. However, this testimony did not indicate how defendant had started the vehicle and from what position in the passenger compartment. Therefore, whether the clutch had to be depressed was not in issue. In any event, plaintiff was able to present evidence on rebuttal that the safety switch on the car could have been bypassed, allowing the car to be started without the clutch depressed.

Further, the testimony and repair manuals were not directly responsive to defendant's proofs and therefore should have been presented during plaintiff's case in chief. *In re Green Trust*, 172 Mich App 298, 329; 431 NW2d 492 (1988) ("Where the proffered testimony could have been introduced in the case in chief, refusing to accept the testimony is not an abuse of discretion.").

Plaintiff finally argues that the trial court abused its discretion when it failed to give a special jury instruction regarding duty that it had earlier agreed to give. We disagree. The genesis of this issue is the fact that the court did not have the written instruction in front of it when it charged the jury. Nonetheless, although the court did not give the instruction plaintiff requested verbatim, it tried to remember the instruction and gave a version of it that the court believed comported with the instruction.

Initially, we note that plaintiff has effectively abandoned this issue by failing to support its assertion with any argument except than to say this case is similar to *Cox, supra*. See *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). In any event, we conclude that the trial court did not commit reversible error in instructing the jury in this case. The instruction given adequately explained the concept that plaintiff's requested jury instruction contained using the circumstances of this case. Further, the instructions in total sufficiently explained plaintiff's theory of the case and the applicable law. Accordingly, it was not an error for the trial court to not reinstruct the jury with plaintiff's requested instruction. See *Chastain, supra* at 591.

Affirmed.

/s/ Christopher M. Murray
/s/ Peter D. O'Connell
/s/ Pat M. Donofrio